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IN THE

Supreme Court of the United States

October Term, 1965.

No. 981.

LEON KIRSCHNER and HENRY NAFTULIN, Individually and as Co-Partners, Trading as K-N Enterprises,
Petitioners,

v.

WEST COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

LEON KIRSCHNER AND HENRY NAFTULIN, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS K-N ENTERPRISES,

Petitioners,

v.

WEST COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Leon Kirschner and Henry Naftulin, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on November 10, 1965.

OPINIONS BELOW.

The *per curiam* decision of the court of appeals (Appendix, *infra*, p. 2A), is not reported. The opinion of the district court (49a-55a) [1] is not reported. The opinions of the court of appeals (22a-29a) and of the district court (18a-21a), at an earlier stage of this action are reported at 300 F. 2d 133 and 185 F. Supp. 317, respectively.

JURISDICTION.

The judgment of the court below (Appendix, *infra*, p. 1A) was entered on November 10, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

1. Page references followed by the letter "a" are to the Appellants' Appendix printed for use in the court below, nine copies of which have been filed with the Clerk of this Court.

QUESTIONS PRESENTED.

1. Where the jurisdiction of the federal court is based solely on diversity, may the federal Arbitration Act be constitutionally applied, as substantive federal law, to alter state-created rights, by enforcing an arbitration provision contained in a license agreement, where the agreement was in all other respects governed by state law, and where the applicable state law was contrary to the federal law applied by the court below?

2. Where petitioners made a written disclosure of a trade secret and, by a separate contemporaneous written agreement, granted respondent an exclusive license to research and develop same, does such an agreement constitute a contract evidencing a transaction involving commerce so as to make applicable the federal Arbitration Act, merely because the license granted to respondent was restricted to use in the pharmaceutical industry, petitioners having reserved all other areas of use to themselves?

3. Does the federal Arbitration Act require the federal court to enforce an arbitration provision contained in an agreement licensing a secret formula and process, where the sole basis of the federal court's jurisdiction is diversity, and the applicable state law would not enforce such arbitration provision, especially when the parties had agreed that state law should apply to such provision?

4. Since the federal Arbitration Act, as a prerequisite to its enforcement, requires that there be an issue referable to arbitration, may it be invoked in the absence of allegation and proof that such issue exists?

5. In a suit arising from the confidential disclosure of a trade secret, containing a count for a breach of trust thereof, and another count for the breach of an agreement licensing its use, may the Federal Arbitration Act, which limits its application to issues arising under an agreement in writing, be enlarged to apply to the non-contractual issue?

STATUTORY PROVISIONS INVOLVED

9 U. S. C.

§ 1. "Maritime transactions" and "commerce defined"; exceptions to operation of title.

* * * "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, * * * July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance

with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * July 30, 1947, c. 392, § 1, 61 Stat. 669.

STATEMENT.

This is a civil action, jurisdiction of the district court being founded upon diversity of citizenship and amount, under 28 U. S. C. § 1332.

Petitioners, citizens of the State of Illinois, instituted this action against respondent, a Pennsylvania corporation, in the United States District Court for the Eastern District of Pennsylvania. The complaint (4a-7a), alleged that by written agreement, dated July 1952, petitioners granted to respondent an exclusive license for the use of a trade secret (par. 5, [4a]), and in addition, confidentially disclosed, in writing, the components of the trade secret (pars. 6 and 7, [5a]). Further alleging a breach of the confidential disclosure, and of the agreement, petitioners demanded an accounting and damages in two separate and distinct counts: (1) for breach of contract (par. 12, [6a]); and (2) misappropriation of the trade secret (par. 13, [6a]).

The agreement, copy of which was attached to the Complaint as Exhibit "A" (7a-15a), concedely was executed in Illinois, and grants an exclusive license to respondent for use in the pharmaceutical industry (Exhibit "A", pars. 1 and 2 [8a]), and provides for the contemporaneous and separate written disclosure of the trade secret (Exhibit "A", pars. 4 [9a] and 8 [10a]). The license for the trade secret is restricted to the pharmaceutical industry, petitioners reserving unto themselves the right to license others for use in connection with other products (Exhibit "A", par. 2 [8a]). The agreement further provided that in the event a dispute arises between the parties, from, out of, or concerning the meaning, construction, interpretation, performance, non-performance or breach of the agreement, the same "shall be submitted to arbitration in the County of Cook, City of Chicago and State of Illinois, pursuant to the Arbitration Laws of the State of Illinois, and the then rules of the American Arbitration Associa-

tion'' and that any award shall be enforceable in any court of competent jurisdiction (par. 15 [13a]).

Respondent did not answer the complaint, but filed a motion to stay proceedings pursuant to the Arbitration Act, 9 U. S. C. § 3 (16a-17a).

The district court granted the motion (21a). In his Opinion (18a-21a), the district judge, after reciting the contract provides a license for the use of the material in the ''pharmaceutical industry,'' and taking ''judicial notice of the fact that the pharmaceutical industry covers the entire United States,'' reasoned the contract was one which provides for the supplying of material to an industry which is countrywide, and concluded the contract was one which evidences a transaction involving ''commerce.'' 185 F. Supp. 317, 319.

The Court of Appeals for the Third Circuit dismissed petitioner's appeal on the ground that the district court's order staying proceedings until the conclusion of arbitration was not an appealable order (22a-29a). 300 F. 2d 133.

Arbitration followed, as a result of which petitioners filed a motion in the district court to vacate, modify or correct the award of the arbitrator (44a-47a). This motion asserted, *inter alia,* the non-enforceability of the arbitration provision of the agreement, and the inapplicability, by interpretation and under the Constitution, of the federal Arbitration Act (44a-45a), points which had been raised on the appeal originally from the district court's order. Respondent filed a motion to confirm the award of the arbitrator (48a).

The district court denied petitioners' motion to vacate the award and confirmed the award (55a). In so doing, it refused to disturb, but agreed with, the conclusions of the earlier district court decision staying the proceedings until arbitration should be had (51a).

On appeal, the court of appeals affirmed, *per curiam,* stating no reasons for its determination (Appendix, *infra,* p. 2A).

REASONS FOR GRANTING THE WRIT.

1. This case raises important constitutional questions mentioned, but unresolved, in *Bernhardt v. Polygraphic Co.*, 350 U. S. 198.

A writ of certiorari was issued by this Court in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 (C. A. 2), to review like constitutional questions projected by the decision replacing state-created rights with federal law, in a diversity case, an area theretofore regarded as one of local character. By stipulation of the parties, the writ was dismissed, 364 U. S. 801.

Moreover, interpretation of the Arbitration Act, 9 U. S. C. §§ 1 et seq, as creating substantive federal rights, thus eliminating the need to determine local law, immediately brings into question the scope of such authority under the national power to regulate commerce, the sole basis assigned for the imposition of federal law here. As noted in *Bernhardt v. Polygraphic Co., supra,* p. 202, serious constitutional implications arise in the light of *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 and *Guaranty Trust Co. v. York,* 326 U. S. 99, where, as here, the jurisdiction of the federal court rests solely upon diversity.

Conflicting views in the courts of appeals appertain. *Cf. American Airlines, Inc. v. Louisville and Jefferson County Air Board,* 269 F. 2d 811 (C. A. 6), with *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*,[2] *supra,* and *Ross v. Twentieth Century Fox Film Corp.*, 236 F. 2d 623 (C. A. 9); see also, *Deep South Oil Co. v. Texas Gas Corp.*, 328 S. W. 2d 897, 906 (alternative holding). The issues have merited academic discussion further reflecting the con-

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2. The court recognized the importance of the questions left open in *Bernhardt v. Polygraphic Co., supra,* but disagreed with the concurring opinion of Mr. Justice Frankfurter, that, to avoid vexing constitutional questions, the U. S. Arbitration Act must be held wholly inapplicable to diversity cases. *Robert Lawrence Company v. Devonshire Fabrics, Inc., supra,* 271 F. 2d at 407.

trariety of opinion with respect to conflicting state-federal and constitutional policies. See, e.g. 69 Yale L. J. 847, 865; 45 Cornell L. Q. 831; 56 Col. L. Rev. 902; 73 Harv. L. Rev. 1382; Kochery, *The Enforcement of Arbitration Agreements in the Federal Courts,* 39 Cornell L. Q. 74; *Sturges and Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act,* 17 Law and Contemp. Prob. 580.

2. The absence of an explanatory opinion by the court of appeals here, and the reliance of the district court (20a), 185 F. Supp. at 319, n. 5, upon *Robert Lawrence, supra,* indicates subscription to its principles, for the courts below in this case did not attempt to ascertain the state law applicable hereto.[3] Of course, one way to minimize the constitutional problems is, as was done in *Robert Lawrence, supra,* to hold that federal substantive law applies. See, Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 Harv. L. Rev. 1, 34. If the Arbitration Act is interpreted to create federal substantive law, state courts presumably could not decline to enforce it.[4] Thus, the result is to minimize the consequences of *Erie* by giving the Act a different and broader

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3. Petitioner contended below that the applicable law is that of the State of Illinois, and that Illinois law would not enforce an agreement to arbitrate in the future. *Cocalis v. Nazlides,* 308 Ill. 152, 139 N. E. 95; *McKenna Process Co. v. Blatchford Corp.,* 304 Ill. App. 101, 25 N. E. 2d 916; *Hill v. Mercury Record Corp.,* 26 Ill. App. 2d 350, 168 N. E. 2d 461, 465-466. Respondent asserted that the Illinois law was changed by statute, Act of Aug. 24, 1961, Laws 1961, p. 3844, § 1. However, the Act specifically provides that it shall apply only to agreements made subsequent to its effective date. Act of Aug. 24, 1961, Laws 1961, p. 3844, § 19. Since the effective date of the Act was August 24, 1961, and the agreement here involved was made in 1952, the law of Illinois prior to the Act is applicable.

Moreover, the agreement of the parties to submit disputes to arbitration "pursuant to the Arbitration Laws of the State of Illinois" (Exhibit "A" par. 15, [12a], required application of Illinois law. See, *Lauritzen v. Larsen,* 345 U. S. 571, 588-9.

4. But see *Dice v. Akron,* C. & Y. R. Co., 342 U. S. 359, 363.

effect than to regulate federal procedure as the Congress intended.[5] Nothing in the Arbitration Act, or its legislative history, warrants the emasculation of state law in this area, otherwise minimal in its national consequences. Verbal cosmetics will not disguise the fact that the Arbitration Act, as construed by *Robert Lawrence* performs a function neither intended nor envisaged by the Congress. Whether such construction is in accord with the Act and the Constitution, or whether it ought to be tolerated as an exercise of judicial legislation, presents a question of national significance which has not been, but ought to be, resolved by your Honorable Court.

3. A threshold question in this case is whether the agreement here between the parties is a contract "evidencing a transaction involving interstate commerce" within the meaning of 9 U. S. C. § 2. In light of the fact that the courts are in disagreement as to the meaning and proper application of the statutory language[6], the short shrift of a per curiam decision is hardly explicable.

Petitioners submit that the agreement licensing a trade secret is not a contract evidencing a transaction involving interstate commerce. It pertains, rather, to a secret formula and process and comprehends research and development thereof. Such an agreement is not unlike an agree-

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5. H. R. Rep. No. 96, 68th Cong. 1st sess. 1 (1924); S. Rep. No. 536, 68th Cong. 1st sess. 3 (1924). *Red Cross Lines v. Atlantic Fruit Co.*, 264 U. S. 109 (1924), was relied upon as declaring the purely procedural quality of arbitration, thus reflecting the understanding that the Arbitration Act was to regulate procedure in the federal courts.

6. In *Metro Corporation v. Terminal Construction Co.*, 287 F. 2d (C. A. 2) cert. den. 368 U. S. 817, the majority looked to actual performance under a painting contract to find interstate commerce, but the minority (287 F. 2d, at 387) looked to the intent of the contracting parties at the time of entering into the agreement. *Cf. John W. Johnson, Inc. v. 2500 Wisconsin Ave.*, 231 F. 2d 761, 764 (C. A. D. C.), holding that a contract to paint a building does not involve interstate commerce.

ment licensing a patent, which has been construed as not evidencing a transaction involving commerce. *Cold Metal Products Co.*, 9 F. Supp. 992 (D. C. D. Pa.).

To arrive at the conclusion of "a transaction involving commerce" the district court simply noted the contractual reference to the "pharmaceutical industry," and took "judicial notice" that the industry is nationwide, and, therefore, substantial interstate activity was involved. But first, the reference to "pharamceutical industry" was purely a limitation upon the exclusive license granted to respondent. Second, it furnished no support or warrant for the conclusion of substantial interstate activity. Third, by taking "judicial notice" that the industry was nationwide and concluding interstate commerce would result, the court, on this pivotal issue, denied petitioners a hearing, at which relevant facts, if deemed necessary, could have been produced.

It is apparent that the district court telescoped the licensing agreement with the possible ultimate business of the respondent. If interstate commerce was involved at all, it was only in respondent's business, and not in the transaction which the contract here in issue evidenced. The contract here did not, like that in *Robert Lawrence,* involve the purchase and movement of merchandise in interstate commerce. Only by altering the language of the Arbitration Act, so that it expressly applies to contracts evidencing transactions which *might affect* interstate commerce can the conclusion of the court below find support.

The issue is patently one of paramount importance. Not merely are the courts in conflict as to the contracts embraced within the Arbitration Act, but upon this question may rest the line of division between state and federal law. That line should be delineated by this Court.

4. The district court ordered a stay of proceedings pending arbitration though there was nothing before it to warrant the conclusion that there was an issue to arbitrate,

which is one of the mandatory requirements of Section 3 of the Act. Respondent's motion (16a) does not assert any issue or that there is one. The opinion of the judge of the district court does not indicate that he considered this important requirement. If, by his silence it is deemed that he was satisfied of the existence of an arbitrable issue, to this extent, petitioners have been deprived of a hearing at which relevant facts in contravention could have been produced.

5. The district court manifestly misinterpreted Section 3 of the Act as extending its jurisdiction to issues set forth in petitioners' complaint arising from non-contractual rights and obligations.

Exhibit "A" attached to the complaint provides for the separate and contemporaneous disclosure of a trade secret (par. 4, [9a]). The complaint alleges the disclosure of said trade secret in confidence (pars. 6, 7, and [5a]), that respondent violated its confidence by conversion and misappropriation (par. 9, [5a])—these allegations being the basis of the relief sought under Count 2 of plaintiffs' action (6a). The violation of the trust relationship by respondent gave certain rights to petitioners, unaffected by contractual or other considerations. *Dupont v. Masland,* 244 U. S. 100.

Section 3 of the Act limits its enforcement to suits "upon any issue referable to arbitration under an agreement in writing for such arbitration." By enlarging the scope of the Act to include the cause of action for violation of the trust relationship, which is separate and distinct from the rights for breach of contract, the court deprived petitioners of a hearing at which their rights on this case of action might have been determined.

CONCLUSION.

For the foregoing reasons, petitioners respectfully pray your Honorable Court issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 15254.

LEON KIRSCHNER AND HENRY NAFTULIN, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS K-N ENTERPRISES,

Appellants,

v.

WEST COMPANY

(D. C. Civil No. 27579)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge,* and MARIS and KALODNER, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 15, 1965, be, and the same is hereby affirmed, with costs.

ATTEST:
IDA O. CRESKOFF,
Clerk.

November 10, 1965

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15254

LEON KIRSCHNER AND HENRY NAFTULIN, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS K-N ENTERPRISES,

Appellants,

v.

WEST COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 17, 1965

Before BIGGS, *Chief Judge,* and MARIS and KALODNER, *Circuit Judges*

OPINION OF THE COURT.

(Filed November 10, 1965)

PER CURIAM.

We have examined the record in this case and have considered the arguments of the parties. We can perceive no error in the decision of the court below and consequently it will be affirmed upon the opinion of Judge Luongo, — F. Supp. — (E.D. Pa. 1965).

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Petitioners,

v.

WEST COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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LEON KIRSCHNER AND HENRY NAFTULIN, INDIVIDUALLY AND AS CO-PARTNERS, TRADING AS K-N ENTERPRISES,
Petitioners,

v.

WEST COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondent, West Company, prays that the Petition for a Writ of Certiorari of Leon Kirschner and Henry Naftulin be dismissed.

OPINIONS BELOW.

The *per curiam* decision of the Court of Appeals is reported at 353 F. 2d 537 (3d Cir. 1965). The opinion of the District Court is reported at 247 F. Supp. 550 (D. C. E. D. Pa. 1965).

ARGUMENT.

The primary question raised by petitioners is whether the United States Arbitration Act [1] may be constitutionally applied as substantive federal law in a case in which the jurisdiction of the federal court rests upon diversity of citizenship. Petitioners characterize this as an important constitutional question "mentioned, but unresolved, in *Bernhardt v. Polygraphic Co.,*" 350 U. S. 198 (1956) (Petition, page 7).[2]

Petitioners suggest that there are conflicting views in the Courts of Appeal. Inferentially, at least, counsel acknowledges that the opinion of Judge Medina in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F. 2d 402 (2d Cir. 1959), *cert. granted* 362 U. S. 909 (1960), *cert. dismissed* 364 U. S. 801 (1960), squarely rules this case against them, which was evidently the view of the District Court, *Kirschner v. West Company,* 247 F. Supp. 550 (D. C. E. D. Pa. 1965), and also that of the Court of Appeals, which affirmed, per curiam, on the opinion of Judge Luongo, 353 F. 2d 537 (3d Cir. 1965). The allegation of a conflict in the Courts of Appeal is not expanded in the Petition. Counsel goes no further than to cite *American Airlines, Inc. v. Louisville and Jefferson County Air Board,* 269 F. 2d 811 (6th Cir. 1959), and *Ross v. Twentieth Century-Fox Film Corp.,* 236 F. 2d 632 (9th Cir. 1956) (Petition, page 7), both decided prior to *Robert Lawrence.* Those cases reached the same conclusion as the Second Circuit in ruling that the federal Arbitration Act is to be applied in a diversity case wherein the arbitration agreement is found in a contract involving a transaction in interstate commerce.

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1. 9 U. S. C. § 1 *et seq.*

2. *Bernhardt* differs from the case at bar in that no maritime transaction or contract evidencing "a transaction involving commerce" was there presented, as noted by the Court at page 200.

The three cases differ only to this extent: *Robert Lawrence* followed federal and not state law in ruling that the arbitrator rather than the court should be the one to determine whether the agreement to arbitrate had been vitiated by fraud. In *American Airlines* and *Ross*, the Sixth and Ninth Circuits ruled that the validity of the underlying contract depended upon state law even though the enforceability of the agreement to arbitrate was to be determined under the federal Arbitration Act.[3]

In the case at bar, there has never been any challenge of the validity of the contract between the parties on the ground of fraud or for any other reason. Petitioners have based their suit upon the contract.

There have in fact been a number of diversity cases involving transactions in admiralty or interstate commerce, in which the Courts of Appeal have passed upon the applicability of the federal Act. They have consistently applied the provisions of that Act and have enforced an agreement to arbitrate without regard to the public policy of a state the law of which would otherwise be applicable. In addition to the three cases cited in the previous paragraph, attention is called to *Monte v. Southern Delaware County Authority*, 321 F. 2d 870, 874 (3d Cir. 1963); *Kentucky River Mills v. Jackson*, 206 F. 2d 111 (6th Cir. 1953), *cert. den.* 346 U. S. 887 (1953); *Amicizia Societa Navigazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F. 2d 805 (2d Cir. 1960), *cert. den.* 363 U. S. 843 (1960); *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F. 2d 382 (2d Cir. 1961), *cert. den.* 368 U. S. 817 (1961);

3. Petitioners have gone no further than to suggest that the arbitration covenant might not be enforceable under *Illinois* law and to state that the contract was made in Illinois. Wholly overlooked is the fact that in the first instance at least the federal court would look to the law of the forum, Pennsylvania, if it should be determined that the federal Act does not apply. Pennsylvania has a strong public policy favoring the enforcement of arbitration covenants. See 5 Purdon's Pa. Stats. Ann. § 161 (1927); *Conneaut Lake Agricultural Association v. Pittsburg Surety Co.*, 225 Pa. 592, 596, 74 Atl. 952, 953 (1909).

In Re Kinoshita & Co. Ltd., 287 F. 2d 951 (2d Cir. 1961). See also *Standard Magnesium Corp. v. Fuchs,* 251 F. 2d 455 (10th Cir. 1957).

In the last analysis, therefore, petitioners are relying on the fact that this Court granted certiorari in *Robert Lawrence* and then was deprived of the opportunity to review the decision of the Second Circuit when, in 1960, the case was settled and the certiorari was dismissed. Circumstances have changed in many respects, however, during the last six years.

In the first place the federal policy to promote the integrity of arbitration agreements has gained enormous impetus in the afterglow of the Steelworkers' trilogy (*United Steelworkers of America v. American Manufacturing Co.,* 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960)). See also *Metro Industrial Painting Corp. v. Terminal Construction Co.,* 287 F. 2d 382 (2d Cir. 1961), *cert. den.* 368 U. S. 817 (1961).

Secondly, the policy of the states themselves with respect to the enforcement of agreements to arbitrate is changing, and that reflected in the federal Arbitration Act is gaining broad acceptance in states that formerly followed the common law policy of "preserving the jurisdiction of the courts" and refusing to enforce agreements to arbitrate future disputes. This change of policy is illustrated in the amendment of the Arbitration Law of Illinois (Act of June 11, 1917, Laws 1917 p. 202, Smith-Hurd, Ill. Ann. Sts., ch. 10 § 1 as amended by the Act of August 24, 1961, Laws 1961, p. 3844 § 1), which has, in effect, changed the public policy of that state and rendered obsolete the common law decisions on which petitioners have relied during the years in which this case has been litigated.

Thirdly, during the six years that have elapsed since the certiorari was dismissed in *Robert Lawrence,* that decision has been cited in federal court decisions on more than

thirty-five occasions, and the basic ruling on which Respondent now relies has not been successfully challenged and has seldom even been questioned.

Petitioners next suggest (Petition, page 9) that there is "a threshold question in this case" as to whether the agreement between the parties is a contract "evidencing a transaction involving interstate commerce".

The complaint contained allegations that plaintiffs had invented a certain coating composition of rubber closures and that "plaintiffs and defendant entered into a certain agreement, in writing, wherein and whereby plaintiffs granted to defendant the sole and exclusive right and license to make, use and apply the said coating composition in connection with rubber or synthetic closures used by the pharmaceutical industry" (R. 4a). At the time the motion for a stay was first before the District Court, Judge Goodrich, sitting specially, took judicial notice of the fact that the pharmaceutical industry covered the entire United States and hence he ruled that the contract evidenced a transaction involving "commerce." *Kirschner v. West Company,* 185 F. Supp. 317, 319 (D. C. E. D. Pa. 1960). In granting the defendants' motion for stay, he dismissed the contention which is now being argued by petitioners that the painting of a rubber stopper did not involve interstate commerce, with the comment: "The citation of cases involving a concept of 'commerce' prevalent in the days of *Hammer v. Dagenhart,* 247 U. S. 251 (1918), does not help us on this problem at the present time" (185 F. Supp. at p. 319). Petitioners' citations of *Cold Metal Process Co.,* 9 F. Supp. 992 (D. C. W. D. Pa. 1935); *Metro Industrial Painting Corp. v. Terminal Construction Co.,* 287 F. 2d 382 (2d Cir. 1961), *cert. den.* 368 U. S. 817 (1961); and *John W. Johnson, Inc. v. 2500 Wisconsin Ave.,* 231 F. 2d 761 (D. C. Cir. 1956), are equally unpersuasive. The language in the contract in suit clearly showed that the transaction

involved "commerce," and plaintiffs have never offered to supply any evidence which might tend to establish the contrary. This point is wholly without merit. See *United States v. Darby,* 312 U. S. 100, 117-118 (1941), and the long line of cases following it.

The suggestion that there was no issue to arbitrate (Petition, page 10) seems to be predicated on the idea that the mere assertion of the plaintiffs' cause of action in their complaint established their right of recovery beyond the possibility of a successful defense, an extreme position that plaintiffs have urged throughout the proceeding. If such a position ever had validity, it was lost when they voluntarily agreed to arbitrate this controversy and participated in the arbitration proceeding. The arbitrator, former Chief Justice Stern of the Supreme Court of Pennsylvania, stated in the Award:

> "By agreement of the parties the matter has been referred to the undersigned as Arbitrator to decide the issues involved. By their further agreement the Arbitrator is first to decide the question of defendant's liability under the contract, and, if that issue be decided in favor of the plaintiffs, the amount due by defendant is to be determined by the Arbitrator in subsequent proceedings." (R. 32a)

Nothing contained in the Petition for a Writ of Certiorari furnishes this Court any basis for a finding that Judge Luongo and the Court of Appeals erred in dismissing this criticism of the arbitrator's award. The assertion that there was no issue to arbitrate was clearly frivolous.

The final ground set forth by the petitioners (Petition, page 11) involves the contention that the federal Arbitration Act covers only the rights arising out of the contractual

relationship of the parties and that in the second count of their complaint they had alleged a violation of the trust relationship of the parties "unaffected by contractual or other consideration." This issue was not raised until after the award.

In effect petitioners are trying to have two opportunities to litigate the same issue. First, they took their chances with the arbitrator to whom they submitted their entire claim without reserving their right to have the "trust relationship" theory later adjudicated by a court. The arbitrator having heard every aspect of their cause of action and having rejected it in toto, they now seek another opportunity to have their claim litigated de novo. Arbitration would soon lose its usefulness if the finality of an award could be disposed of in such a cavalier fashion.

CONCLUSION.

Petitioners have shown no substantial conflicts between the Circuits which require resolution in this Court. Since no basis is presented for the grant of a Writ of Certiorari, the Petition should be dismissed.

Respectfully submitted,

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